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Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01–11 OF 2007
ABDUL MALIK ISHAK, LOW HOP BING AND SULAIMAN DAUD JJCA
11 AUGUST 2008

C

Civil Procedure — Judicial review — Whether any application to challenge decision of public authority can only be commenced by way of judicial review under new O 53 of the Rules of the High Court 1980 — When new O 53 became effective — Remedies available under new O 53

D

Civil Procedure — Striking out — Statement of claim — Order for striking out granted — Appeal against — Whether abuse of the process of court to commence a writ action to challenge decision of public authority — Whether appellant E *should have commenced action by way of judicial review under new O 53 of the Rules of the High Court 1980 — Rules of the High Court 1980 O 18 r 19(1)(b), (d) & O 53*

F The plaintiff/appellant was a cultural officer with the Ministry of Culture, Arts and Tourism since 16 September 1993. As from 28 March 2001, the appellant stopped going into work because of a dispute between him and a senior officer. Upon later enquiry the appellant learnt that he had been dismissed from service with effect from 25 October 2001 vide *gazette* G notification No 11898. The appellant then commenced proceedings against the respondent by way of a writ and statement of claim. In response thereto, the respondent filed an application under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 ('RHC') to strike out the appellant's writ and statement of claim. The respondent contended that the appellant's action H against the respondent ought to have been commenced by way of a judicial review under the new O 53 of the RHC and that it was an abuse of the process of the court to commence the proceedings by way of a writ instead. This was an appeal against that decision to allow the respondent's striking out application. The central issue before this court was whether it was an abuse I of the process of the court for the appellant to commence a writ action in order to challenge the respondent's decision to dismiss him from service.

Held, dismissing the appeal with costs:

Any application to challenge the decision of the respondent, a public authority can only be commenced by way of a judicial review under the new O 53 of the RHC which replaces the former O 53 of the RHC and came into effect from 21 September 2000. The new O 53 of the RHC, which now governs the public law remedy of judicial review, allows anyone who proposes to challenge the acts or omissions of a public authority to apply to the High Court for any one of the prerogative orders of habeas corpus, mandamus, prohibition, certiorari or a declaration. The Malaysian courts have since dutifully applied the principle that where an issue depended exclusively on the existence of a purely public law right, then the matter must be determined in judicial review proceedings and not otherwise. As such, the commencement of this action by writ was an attempt at circumventing the requirements of the new O 53 of the RHC and that would amount to an abuse of the process of the court. (see paras 10, 27 & 54).

Per incuriam:

The court's sole function in judicial review proceedings had always been to scrutinise the decision making process and not to question the decision itself. The accepted legal position in England, Hong Kong and Malaysia was to quash the decisions and thereafter to remit the cases to the original decision maker to reconsider the matter. However, in recent years the Malaysian courts have become bold with regard to hitherto accepted principles relating to judicial review in that they have questioned not only the process but also the decision itself and where necessary substituted their own views for those of the decision maker. In short the Malaysian courts have not stopped at quashing and remitting the case back to the decision maker but have assumed the jurisdiction to proceed ahead and take the bold step of granting the consequential relief, which practice is endorsed as necessary to meet the ends of justice (see paras 16–18).

[Bahasa Malaysia summary

Plaintif/perayu adalah pegawai kebudayaan dengan Kementerian Kebudayaan, Seni dan Pelancongan semenjak 16 September 1993. Sejak dari 28 Mac 2001, perayu telah berhenti daripada pergi bekerja kerana pertikaian dengan pegawai atasan. Setelah pertanyaan susulan perayu mendapati bahawa beliau telah diberhentikan dari perkhidmatan berkuat kuasa dari 25 Oktober 2001 menerusi warta nombor pemberitahuan 11898. Perayu kemudiannya memulakan prosiding terhadap responden melalui writ dan penyataan tuntutan. Di dalam membalas, responden seterusnya bertindak dengan memfailkan permohonan di bawah A 18 k 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980('KMT') untuk mengenepikan writ dan penyataan tuntutan perayu. Responden menegaskan bahawa tindakan perayu terhadap responden sepatutnya dimulakan secara semakan kehakiman di bawah A 53 KMT yang baru dan ia adalah satu penyalahgunaan proses mahkamah

A sekiranya memulakan prosiding-prosiding melalui writ. Ini adalah rayuan terhadap keputusan untuk membenarkan permohonan pembatalan responden. Isu utama di hadapan mahkamah ini adalah sama ada ia adalah satu penyalahgunaan proses mahkamah bagi perayu memulakan tindakan writ untuk mencabar keputusan responden memberhentikan beliau dari
B perkhidmatan.

Diputuskan, mengenepikan rayuan dengan kos:

C Apa-apa permohonan untuk mencabar keputusan responden, pihak berkuasa awam, hanya boleh dimulakan melalui semakan kehakiman di bawah A 53 KMT yang baru yang menggantikan A 53 KMT yang terdahulu dan berkuat kuasa dari 21 September 2000. Aturan 53 KMT yang baru, yang mana sekarang mengawal remedi undang-undang awam, membenarkan sesiapa
D yang mencadangkan untuk mencabar tindakan-tindakan atau ketinggalan-ketinggalan oleh pihak berkuasa awam untuk memohon kepada Mahkamah Tinggi untuk mana-mana perintah prerogatif perintah habeas corpus, mandamus, larangan, certiorari atau satu deklarasi. Mahkamah-mahkamah Malaysia telah secara bertanggungjawab
E mengaplikasikan prinsip bahawa di mana satu isu bergantung secara eksklusif di atas kewujudan undang-undang awam semata-mata, maka hal tersebut mesti diputuskan dalam semakan kehakiman dan tidak sebaliknya. Oleh itu, permulaan tindakan ini melalui writ adalah satu usaha memintas
F keperluan-keperluan A 53 KMT dan ini merupakan penyalahgunaan proses mahkamah (lihat perenggan 10, 27 & 54).

Per incuriam:

Satu-satunya fungsi mahkamah dalam prosiding-prosiding semakan
G kehakiman adalah meneliti proses membuat keputusan dan bukan menyoal keputusan tersebut. Kedudukan undang-undang yang diterima di England, Hong Kong dan Malaysia adalah untuk membatal keputusan-keputusan tersebut dan seterusnya meremit kes-kes tersebut kepada pembuat keputusan asal untuk mempertimbangkan semula hal tersebut. Namun begitu, dalam
H tahun-tahun kebelakangan ini mahkamah-mahkamah Malaysia telah menjadi berani berkenaan prinsip-prinsip yang diterima sekarang ini berkaitan dengan semakan kehakiman, di mana mereka telah menyoal bukan hanya proses malah keputusan tersebut dan di mana perlu menggantikan keputusan pembuat keputusan dengan pandangan-pandangan mereka sendiri. Secara
I ringkasnya mahkamah-mahkamah Malaysia bukan sahaja membatal dan meremit kes semula kepada pembuat keputusan tetapi telah memikul bidang kuasa untuk meneruskan dan mengambil langkah berani dengan membenarkan relief berbangkit, di mana langkah ini telah diendors sebagai perlu untuk memastikan keadilan (lihat perenggan 16–18).]

Notes

For cases on judicial review in general, see 2(1) *Mallals Digest* (4th Ed, 2007 Reissue) paras 4324–4328.

For cases on statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6750–6786.

Cases referred to

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1 (refd)

Amin [On appeal from Regina v Entry Clearance Officer, Re Bombay, Ex parte Amin] [1983] 2 AC 818, 829 (refd)

An Application By Hong Kong Factory Owners Association Ltd, Re [1986] HKLR 384 (refd)

An Application By IFPI (South East Asia) Ltd For Judicial Review, Re [1986] HKLR 865 (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors [2003] 1 MLJ 567 (refd)

Chan Yat-San And Others v The Attorney General [1976] HKLR 694 (refd)

Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155; [1982] 3 All ER 141 (refd)

Chim Shing Chung v The Commissioner of Correctional Services [1996] HKLY 7 (refd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1984] 3 All ER 935 (refd)

Dato' Seri Anwar Ibrahim v Perdana Menteri Malaysia & Anor [2007] 4 MLJ 422

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (refd)

Ghozi Abu Bakar v Majlis Angkatan Tentera & Anor [2006] 4 CLJ 291 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (folld)

Mercury Communications Ltd v Director General of Telecommunications & Anor [1996] 1 All ER 575 (refd)

O'Reilly & Ors v Mackman & Ors [1983] 2 AC 237 (distd)

Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558 (refd)

Puhlhofer & Anor v Hillingdon London Borough Council [1986] 1 AC 484 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Refugee Status Review Board v Bui Van Ao [1997] 3 HKC 641 (refd)

Wong Shu-Hung And The Immigration Tribunal, Re [1985] HKLR 463 (refd)

Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705; [1992] 1 AC 624 (refd)

Royal Hong Kong Jockey Club v Peter James Miers [1983] 1 WLR 1049 (refd)

A *Sakchai Suwannapeng, In Re* [1990] 2 HKLR 231 (refd)
Shaharuddin Ali & Anor v Superintendent of Lands and Surveys Kuching Division & Anor [2005] 4 MLJ 555 (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413 (refd)
Soonly Limes Factory Sdn Bhd v Pengarah Jabatan Pengangkutan Negeri Perak
B [2006] 2 CLJ 676 (refd)
Subramaniam Vythilingam v The Human Rights Commission of Malaysia (SUHAKAM) & Ors [2003] MLJU 94; [2003] 6 CLJ 175 (refd)
Sugumar Balakrishnan v Chief Minister of State of Sabah & Anor [1989] 1 MLJ 233 (refd)
C *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (refd)
Teh Guan Teik v Inspector General of Police & Anor [1998] 3 MLJ 137 (refd)
Tesco Stores Ltd v Secretary of State for the Environment & Ors [1995] 1 WLR 759 (refd)
D *TR Lampoh ak Dana & Ors v Government of Sarawak* [2005] 6 MLJ 371 (refd)
Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council [1997] 4 All ER 747 (refd)
Yahya bin Kassim v Government of Malaysia & Anor [1997] 3 MLJ 749 (refd)

E
Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Housing (Homeless Persons) Act 1977 [UK]
Rules of the High Court 1980 O 1A, O 18 r 19(1), O 18 r 19(1)(b), O 18
F r 19(1)(d), O 53
Specific Relief Act 1950
Supreme Court Rules 1982 [UK] O 53

G **Appeal from**: Civil Suit No 22–72 of 2004 (High Court, Johor Bahru)

G Subramaniam Nair (Ebrina bt Zubir with him) (Maniam Nair & Co) for the plaintiff/appellant.
Azizah Nawawi (Senior Federal Counsel, Attorney-General's Chambers, Putrajaya) for the defendants/respondents.

H
Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

I **[1]** This was an appeal against the decision of the learned judicial commissioner who allowed the defendants/respondents' application under O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980 ('RHC') to strike out the plaintiff/appellant's writ and the statement of claim dated 15 January 2004 on the grounds that it was 'scandalous, frivolous or vexatious' or 'an

abuse of the process of the court' to commence the proceedings by way of a writ instead of by way of an application for judicial review under the new O 53 of the RHC.

[2] While he was at the High Court bench, my learned brother Low Hop Bing JCA had, in *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1, the privilege of construing O 18 r 19(1) of the RHC and this was what His Lordship said (see p 8 of the report):

> It is trite law that it is only in conspicuously unsustainable cases that a pleading generally and a claim specifically would be struck out under any limb of O 18 r 19(1) and such power would only be exercised by the court sparingly.

[3] In *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558, sitting on the High Court bench, I too had the opportunity of construing O 18 r 19(1) of the RHC and after reviewing some authorities, I had this to say (see p 584 of the report):

> … it would be appropriate to say that a case should only be struck out if it is obviously unsustainable. The root word here is not 'unsustainable' but rather 'obviously' which denotes that on the face of it, the claim must be plainly or evidently unsustainable in law.

[4] On jurisdiction, the defendants/respondents submitted that the plaintiff/appellant should have proceeded under the new O 53 of the RHC. The plaintiff/appellant, on the other hand, argued to the contrary. Obviously there was a want of jurisdiction. It was not a question of irregularity that can be cured under O 1A of the RHC. A waiver can never confer jurisdiction to a court.

THE SALIENT FACTS

[5] The plaintiff/appellant was working as a cultural officer attached with the Ministry of Culture, Arts and Tourism since 16 September 1993 on a B5 scale. The plaintiff/appellant had a dispute with his senior officer and he decided not to come to work since 28 March 2001. The plaintiff/appellant directed his counsel Messrs Abdul Razak Ahmad & Associates to issue a letter dated 25 January 2003 to the defendants/respondents enquiring as to the status of the plaintiff/appellant.

[6] The startling news came. It was in the form of a letter dated 7 February 2003 addressed to the plaintiff/appellant's lawyers stating that the plaintiff/appellant had been dismissed from service with effect from 25 October 2001 vide *gazette* notification No 11898 dated 25 October 2001.

[7] On 15 January 2004, the plaintiff/appellant filed the writ of summons and the statement of claim.

[8] In response thereto, the defendants/respondents filed a summons in chambers dated 21 July 2004 to strike out the plaintiff/appellant's writ and statement of claim under O 18 r 19(1)(b) and (d) of the RHC.

THE ISSUE

[9] Only one issue was ventilated before us. It was focussed along this line: whether it was an abuse of the process of the court to commence the proceedings by way of a writ and statement of claim instead of filing an application for judicial review under the new O 53 of the RHC? We would answer this question in the positive. Our reasons are now set out hereinafter.

ANALYSIS

[10] In a nutshell, any application to challenge the decision of the first defendant/respondent, a public authority, can only be commenced by way of a judicial review under the new O 53 of the RHC. Amendments to the former O 53 of the RHC were made by way of a *gazette* notification vide PU (A) 342/2000 with effect from 21 September 2000 and the new O 53 of the RHC is rather comprehensive. It governs the public law remedy of judicial review and it replaces the former O 53 of the RHC prerogative remedies of certiorari, prohibition and mandamus.

[11] The new O 53 of the RHC carries the caption 'Application For Judicial Review' and it allows anyone who proposes to challenge an administrative act or omission to apply to the High Court for one of the prerogative orders like habeas corpus, mandamus, prohibition, quo warranto or certiorari or, in suitable situations, the popular remedy of declaration. Indeed, this court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413 CA, aptly said through Gopal Sri Ram JCA at p 420 of the report:

> It must not be forgotten that O 53 in its present form was introduced to cure the mischief of its percursor, which was much narrower and more restrictive.

[12] At this juncture, it is appropriate to reproduce verbatim the new O 53 of the RHC. It is worded as follows:

ORDER 53

APPLICATION FOR JUDICIAL REVIEW

1. Scope (O 53 r 1)

(1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This Order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

2. Applications (O 53 r 2)

(1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form 111A.

(2) An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

3. Leave (O 53 r 3)

(1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for leave must be made ex parte to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The Judge may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

4. Notice (O 53 r 4)

(1) Where leave has been granted under this rule, the applicant shall, within 14 days after the grant of such leave, file a notice in Form 111B.

(2) Upon extraction of the sealed copy of Form 111B the applicant shall serve a copy of the same together with a copy of the statement and all affidavits in support on all persons directly affected by the application not later than 14 days before the date of hearing specified in the said Form.

5. Damages (O 53 r 5)

(1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if —

(a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates; and

(b) the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

(2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading.

6. Discovery, etc (O 53 r 6)

Within 14 days after leave has been granted, any party to an application for judicial review may apply to the Judge for discovery and inspection of documents pursuant to Order 24, to administer interrogatories pursuant to Order 26, or to cross-examine the deponent of any affidavit filed in support of or in opposition to the application pursuant to Order 38.

7. Amendment (O 53 r 7)

(1) The Judge may allow the statement to be amended, and may allow further affidavits to be used if they deal with new matters arising

out of any affidavit of any other party to the application, and where the applicant intends to amend his statement or use further affidavits, he must immediately give notice of his intention and of any proposed amendment of his statement to every other party.

(2) Every party to the application must supply to any other party copies of the affidavits which he proposes to use at the hearing.

8. Other persons who may be heard (O 53 r 8)

(1) Upon the hearing of an application for judicial review, any person who desires to be heard in opposition to the application and appears to the Judge to be a proper person to hear may be heard notwithstanding that he has not been served with the cause papers in the matter.

(2) Where on application for judicial review, an order of certiorari is made in any such case the order shall direct that the proceedings shall be quashed forthwith on their removal to the High Court.

9. No setting aside of order (O 53 r 9)

No application to set aside any order made by the Judge shall be entertained, but the aggrieved may appeal to the Court of Appeal.

[13] Now, when one talks about judicial review, it immediately brings to the forefront the Specific Relief Act 1950 (Act 137) as well as para 1 of the Schedule to the Courts of Judicature Act 1964 (Act 91) (Revised 1972). I shall now reproduce verbatim the latter:

SCHEDULE

(Section 25 (2))

ADDITIONAL POWERS OF HIGH COURT

1. Prerogative writs

Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[14] Statutorily, it is clear that under para 1 of the Schedule to the Courts of Judicature Act 1964 (Act 91) (Revised 1972) the High Court has the power to issue to any person or authority directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others. Likewise the High Court too has the powers under

A the Specific Relief Act 1950 (Act 137) to grant reliefs like mandamus, declaration and injunction. All these are housed under the new O 53 of the RHC.

B **[15]** Judicial review is not concerned with reviewing the merits of the decision but rather the decision making process itself. Lord Hailsham of St Marylebone LC in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1160; [1982] 3 All ER 141 at p 143 puts it politely in this manner:

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> The first observation I wish to make is by way of criticism of some remarks of Lord Denning MR which seem to me capable of an erroneous construction of the purpose of the remedy by way of judicial review under RSC Order 53. This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs
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> D and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making
>
> E the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.
>
> Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But
>
> F it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.

G

[16] The legal positions in England, Hong Kong and Malaysia have always been that in judicial review proceedings, the court's sole function is simply to scrutinise the decision-making process and not to question the decision itself. And that when the courts have quashed decisions, the courts have invariably

H remitted the cases to the original decision-maker to reconsider the matter. Hitherto this is the accepted legal principles. But, in recent years, there is 'an upsurge of judicial activism' (to borrow the words of Lord Roskill in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 HL, at p 953) of the courts in Malaysia to change some hitherto accepted

I concepts relating to judicial review as reflected in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 CA; *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 CA; and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 FC.

[17] In judicial reviews, our courts have been bold and have questioned not only the process but also the decision itself and where necessary our courts have substituted their own views for those of the decision-maker. In short, our courts do not stop at quashing the decision and remitting it back to the decision-maker but have assumed the jurisdiction to proceed ahead and take the bold step of granting the consequential relief. A classic example is the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, a decision of this court, where Gopal Sri Ram, JCA writing a separate judgment had this to say at pp 543–545 of the report:

> Consequently, the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.
>
> In my judgment, the wide power conferred by the language of para 1 of the Schedule enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice.
>
> Let me illustrate. Assume for a moment that an award of the Industrial Court upholding the dismissal of a workman is quashed by certiorari. The ordinary course — and this is the course that would be taken by an English court — would be to remit the matter to the Industrial Court by way of mandamus to compel it to rehear the case. But the resultant delay and the inevitable result in the workman's favour may well be compelling factors to justify the award of relief by the High Court.
>
> In a proper case, I envisage no impediment to the High Court making the appropriate determination and awarding fair compensation to the workman. In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked tribunal.
>
> Similarly, if the decision of the Minister not to make a reference under s 20(3) is quashed, there is no difficulty in issuing a direction addressed to him, requiring him to refer the representations to the Industrial Court. I am, therefore, satisfied that the concession to this effect by Encik Sivabalah and Cik Haliza was correctly made.
>
> Fact patterns being numerous, examples may be multiplied with no real benefit in point of principle. In the final analysis, it all depends upon the facts of each case and upon an objective assessment how the justice of the case is to be met.

I notice that in the field of public law remedies, Indian Courts, acting on the words of art 226(1), have adopted a more flexible stance than their English counterparts.

In *Hindustan Steel Ltd, Rourkela v Roy AK* AIR 1970 SC 1401, the Supreme Court of India, having quashed an order of reinstatement made by the Industrial Tribunal, went on to make an award of compensation. The basis upon which this was done appears in the following passage in the judgment of Shelat J at p 1407 of the report:

> The question next is, having held that the order of reinstatement was not a proper order, in that, it was not in consonance with the decided cases, do we simply quash the order of the Tribunal and that of the High Court and leave the concerned workman to pursue his further remedy? The other alternative would be to remand the case to the Tribunal to pass a suitable order. In either case, in view of this judgment, no other order except that of compensation can be obtained by him. If the case is remanded and the Tribunal on such remand passes an order of compensation and fixes the amount such a course would mean further proceedings and a possible appeal. That would mean prolonging the dispute, which would hardly be fair to or conducive to the interests of the parties. In these circumstances we decided that it would be more proper that we ourselves should determine the amount of compensation which would meet the ends of justice.

In *Variety Emporium v Mohd Ibrahim* AIR 1985 SC 207, Chandrachud CJ considered the principle to be well-settled. He said (at p 210):

> No authority is needed for the proposition that, in appropriate cases, the court must have regard to events as they present themselves at the time when it is hearing the proceeding before it and mould the relief in the light of those events.

Workmen of Syndicate Bank, Madras v Government of India [1984] 1 SCLJ 685, is yet another case where the Supreme Court fashioned a remedy that was appropriate to the facts and circumstances before it. When allowing the appeal, Bhagwati J said (at p 686):

> We would direct the government of India to reconsider the question of making reference of the industrial dispute for adjudication without taking into account the aforesaid irrelevant ground which seems to have prevailed with them in declining to make the references. If the government of India yet declines to make a reference and the ground on which such reference is declined is improper or irrelevant it would be open to the appellants to make an application to the court under this appeal and for this purpose, we give liberty to the appellants to apply. The government of India will give its decision on the question whether the industrial dispute should be referred or not within 45 days from today.

Turning now to the present case, even if I am to conclude that mandamus was wrongly issued by the learned judge — and I hasten to add that this is not the conclusion I reach — I see no difficulty in substituting it with a direction under para 1 of the Schedule to the like effect. But I am unable to detect any reason of principle or policy for making such a substitution for the sole purpose of satisfying some antiquated legalism that has its origins in the common law of England.

Here, as earlier observed, the Minister had but two alternatives open to him. He could either refer or decline to do so. He elected the latter course and exhausted so much of the power as distinctly relates to that choice. So, all that is left is the power to refer, which, I am satisfied, is amenable to mandamus. In the circumstances, I am unable to accede to the submissions of counsel directed against the order of mandamus made by the learned judge. Further, I would, on reflection, add that the observations of Shelat J in *Hindustan Steel Mills* may be applied mutatis mutandis to the present appeals.

[18] We categorically endorse the views of our learned brother Gopal Sri Ram JCA as reproduced above.

[19] Unlike the Malaysian courts, the English and the Hong Kong courts appear to be more conservative in their approach to applications for judicial review. On judicial review, the powers of the Hong Kong courts are limited: all that the court can do is to determine if the decision taken is lawful or not. The Hong Kong courts cannot substitute its own views for those of the agency, the courts can only remit the case back to the original authority but will not tell the authority what decision to take (*Royal Hong Kong Jockey Club v Peter James Miers* [1983] 1 WLR 1049, 1054, PC; *Re An Application By Hong Kong Factory Owners Association Ltd* [1986] HKLR 384 Full Bench; *Chan Yat-San & Ors v The Attorney General* [1976] HKLR 694 High Court; *In Re Amin [On appeal from Regina v Entry Clearance Officer, Bombay, Ex parte Amin]* [1983] 2 AC 818, 829, HL; *Re An Application By IFPI (South East Asia) Ltd For Judicial Review* [1986] HKLR 865 High Court; and *In Re Sakchai Suwannapeng* [1990] 2 HKLR 231 High Court).

[20] The Hong Kong courts will not review a decision merely because it is insensitive (*Re Wong Shu-Hung and The Immigration Tribunal* [1985] HKLR 463 High Court). The Court of Appeal of Hong Kong in the case of *Chim Shing Chung v The Commissioner of Correctional Services* [1996] HKLY 7 applied the case of *Council of Civil Service Unions & Ors v Minister for the Civil Service* and held that competing policy considerations were not matters that courts of law could properly weigh. They were matters of value judgment based on priorities which the decision maker considered relevant. Applying the case of *Chief Constable of the North Wales Police v Evans*, the Court of Appeal of Hong Kong further held that judicial review was concerned, not with the decision, but with the decision making process.

[21] It pays to remind oneself of what Lord Hoffman said in the case of *Tesco Stores Ltd v Secretary of State for the Environment & Ors* [1995] 1 WLR 759. There, Lord Hoffman had this to say at p 780 F–H:

A The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not B lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

C This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning D authority or the Secretary of State.

[22] The speech of Lord Brightman in *Puhlhofer And Another v Hillingdon London Borough Council* [1986] 1 AC 484 merits reproduction. There at E p 518 of the report, Lord Brightman had this to say:

My Lords, I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the Act of 1977. Parliament intended the local authority to be the judge of fact. The Act F abounds with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that. Although the action or inaction of a local authority is clear susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. G The plight of the homeless is a desperate one, and the plight of the applicants in the present case commands the deepest sympathy. But it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. The ground upon which the courts will review the exercise of an administrative discretion is abuse of power — eg bad faith, a mistake H in construing the limits of the power, a procedural irregularity, or unreasonableness in the Wednesbury sense — unreasonableness verging on an absurdity: see the speech of Lord Scarman in *Reg v Secretary of State for the Environment, Ex parte Nottinghamshire County Council* [1986] AC 240, pp 247–248. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body I and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.

[23] Of course, what Lord Brightman said was made in the context of planning law. But what His Lordship said would certainly apply to judicial review in general.

[24] I cannot help but note that in the exercise of its supervisory jurisdiction in judicial review cases, the court has lapsed into an approach which borders on the exercise of appellate jurisdiction. This is particularly true in the case of *Chim Shing Chung v The Commissioner of Correctional Services* where the Court of Appeal of Hong Kong, in allowing the appeal of the Commissioner, pointed out that the judge who quashed the decision had fallen into a grave error because the judge had *stepped into the Commissioner's shoes*.

[25] The Court of Appeal of Hong Kong in *Refugee Status Review Board v Bui Van Ao* [1997] 3 HKC 641 emphasised, once again, the proper role of the court in judicial review cases. There, the respondent/applicant had been refused refugee status by an immigration officer and the decision was affirmed by the appellant board in 1992. In 1996, the appellant board reviewed its decision again but did not change its decision. The judge held, on judicial review, that the appellant board had made serious errors in understanding the evidence adduced before it. According to the judge, the appellant board had erred in deciding the facts and erred in law in finding that the ill-treatment which the respondent had received while in detention in Vietnam for an offence *could not have been persecution* because it had not been officially sanctioned. The appellant board appealed to the Court of Appeal. In unanimously allowing the appeal, the Court of Appeal held that the judge had usurped the fact-finding function of the appellant board.

[26] Both the English and the Hong Kong courts are in tandem with one another. They both view the jurisdiction in judicial review proceedings within its traditional framework. Less robust than our courts. They consider that the courts in judicial review proceedings had only a limited role to play, namely, supervisory and not appellate. They steer clear of descending into the arena of the actual merits of the decision itself.

[27] Reverting back to the mainstream of the appeal, it was rightly pointed out that the commencement of this action by writ was an attempt at circumventing the requirements of the new O 53 of the RHC and that would amount to an abuse of the process of the court and, consequently, should be struck out with costs.

[28] The cut-off point for the application of the new O 53 of the RHC would be on 21 September 2000. That was the date when the new O 53 of the RHC came into effect.

[29] It would be ideal, at this juncture, to examine some authorities that were decided prior to 21 September 2000. I shall do so now.

(a) Pre-2000 authorities

[30] The case of *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137, a decision of the then Federal Court. That was a case where a police sergeant (the appellant) was dismissed from service and he filed a writ action in the High Court for, inter alia, a declaration that his termination was without any reasonable cause or excuse and without any lawful justification or fair play and he too sought for reinstatement. The High Court allowed his application. On appeal to the Court of Appeal by the respondents, the appeal was allowed based on the preliminary objection that the wrong procedure was adopted by the appellant police sergeant in filing the action for the declarations. The appellant police sergeant appealed to the then Federal Court. Leave to appeal was granted by the then Federal Court. In allowing the appeal, the then Federal Court set aside the order of the Court of Appeal and restored the High Court's order.

[31] The appeal before the then Federal Court in *Teh Guan Teik*'s case centred on only one issue and that issue was this: *what is the correct procedure for a police officer dismissed by a disciplinary body to challenge the decision, ie whether by way of declaration or certiorari or either?* The then Federal Court answered the question posed by stating that the remedies of declaration and certiorari are not mutually exclusive but are concurrent remedies and the fact that the remedy of certiorari was available to the appellant police sergeant did not debar him from claiming the remedy of declaration. Peh Swee Chin FCJ, writing a separate judgment, at p 149 of the report made reference to the case of *O'Reilly v Mackman* [1982] 3 All ER 1124 ; [1983] 2 AC 237 HL, and His Lordship then said that *O'Reilly* was not followed by the Malaysian courts as demonstrated by the case of *Sugumar Balakrishnan v Chief Minister of State of Sabah & Anor* [1989] 1 MLJ 233.

[32] Mohamed Noor Ahmad J (later FCJ) who decided the case of *Sugumar Balakrishnan* at the Kota Kinabalu High Court held that *O'Reilly and the case of Cocks v Thanet District Council* [1982] 3 All ER 1135 HL, cannot be followed by our courts and His Lordship gave these reasons (see p 236 of the report of the case of *Sugumar Balakrishnan*):

> With due respect, the ratio decidendi in the aforesaid two English cases (referring to *O'Reilly* and *Cocks v Thanet District Council*) cannot be followed here since we have not accepted the English new O 53 and its statutory underpinning (that is to say, s 31 of the English Supreme Court Act). Our present O 53 is in pari materia with O 53 under the pre-1977 English Rules.

[33] This court in *Yahya bin Kassim v Government of Malaysia & Anor* [1997] 3 MLJ 749 applied the principle enunciated in *O'Reilly* and Mahadev Shankar, JCA delivering the judgment of this court had this to say at pp 752–753 of the report:

> Quite apart from the fact that the appeal was devoid of merit, we are astonished that the appellant was persuaded to bring it, because it is an abuse of process to resort to an action for declaration and thereby evade the clear requirements of O 53 r 1A of the RHC. Our rules on this subject are almost in pari materia with the English rules. The subject has been decided in *O'Reilly & Ors v Mackman & Ors* [1983] 2 AC 237. It should suffice to set out the relevant part of the headnote. It reads (at p 238):
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> > Held, dismissing the appeals, that since all the remedies for the infringement of rights protected by public law could be obtained on application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors' adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals.
>
> It is a pity this action was ever allowed to get off the ground because it was such an obvious non-starter.

[34] Be that as it may, we now have the new O 53 of the RHC and all litigants must abide by it. It is interesting to note that the new O 53 of the RHC is in pari materia with the post 1977 O 53 of the English Supreme Court Rules 1982.

(b) Post 1977 O 53 of the English Supreme Court Rules 1982 (Post 1977 English cases)

[35] While the position in Britain pre 1977 gave a person seeking judicial review a number of different procedures, the position in Britain post 1977 introduced several procedural improvements in the area of judicial remedies. It has done away with the pre 1977 version. The post 1977 introduced one single procedure known as *Applications for Judicial Review* which allows an applicant to apply to the High Court for the remedies of mandamus, prohibition, certiorari, declaration or an injunction. The post 1977 O 53 of the English Supreme Court Rules 1982 received the comments of Lord Diplock in *O'Reilly* at p 1133 of the All England Law Reports and at p 283 of the Appeal Cases report:

A So O 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged on the hearing of the application, can be granted to him.

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[36] The issue before the House of Lords in *O'Reilly* was this. Whether it was an abuse of the process of the court for the plaintiffs there to commence a writ action in order to challenge a decision of a public authority instead of proceeding by way of a judicial review? At p 1134 of the All England Law C Reports and at p 285 of the Appeal Cases report, Lord Diplock had this to say:

Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application D for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 E for the protection of such authorities.

[37] The facts in *O'Reilly* may be stated as follows. The appellants there who were prisoners sought declarations against the board of visitors of a F prison to declare that a disciplinary award of forfeiture of remission of sentence by the board of visitors was null and void for breach of the rules of natural justice and /or alleged bias on the part of a member who presided over the hearing. The board of visitors applied to the High Court for striking out the proceedings as being an abuse of the process of the court on the ground G that the proper remedy should be by way of judicial review to quash the decision of the board of visitors instead of by way of a declaration. The High Court refused the application. On appeal, the Court of Appeal struck out the proceedings. On further appeal to the House of Lords, the decision of the Court of Appeal was affirmed.

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[38] Next, it would be the case of *Cocks v Thanet District Council*. That case applied *O'Reilly* and laid down the same proposition of law.

[39] The issue that came up for decision in *Cocks v Thanet District Council* I was this. Whether the respondent William Charles Cocks was entitled to proceed against the appellants by an action brought in the Thanet County Court for a declaration to the effect that the appellants owed him a duty under the Housing (Homeless Persons) Act 1977 to provide him with permanent accommodation?, or, to put it in another way, whether the

respondent was required to apply for judicial review of the appellants' decision that the respondent had become homeless intentionally? Lord Bridge of Harwich, delivering the judgment of the House of Lords, said that it would amount to an abuse of the process of the court for an unsuccessful applicant seeking accommodation under the Housing (Homeless Persons) Act 1977 to challenge the decision of the housing authority by way of declaration rather than by way of judicial review under O 53 of the English Supreme Court Rules 1982. In his own words, this was what Lord Bridge of Harwich said at p 1140 of the report:

> It follows from these considerations that proceedings in which an unsuccessful applicant for accommodation under the 1977 Act sets out to challenge the decision of the housing authority against him will afford another application of Lord Diplock's general rule and will amount to an abuse of the process of the court if instituted otherwise than by an application for judicial review under Order 53.

Cocks v Thanet District Council dutifully followed *O'Reilly* and gave prominence to the protection given to public authorities by virtue of O 53 of the English Supreme Court Rules 1982 to the extent that leave to bring proceedings was required and a time limit imposed subject to good reason for extending it.

[40] It cannot be denied that *O'Reilly* exerted an important influence on the regulation of court proceedings where an individual seeks to assert his rights against a public authority. Lord Diplock in his judgment in *O'Reilly* merely set out the position *as a general rule* and he then proceeded to say that the Rules Committee and the Legislature were (see p 1134 of the All England Reports and at p 285 of the Appeal Cases report):

> ... content to rely on the express and the inherent power of the High Court, exercised on a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.

[41] Continuing at the same pages of both the All England Reports and the Appeal Cases report, Lord Diplock had this to say in *O'Reilly*:

> … there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons.

[42] Of course, when you talk about exceptions, it should be based on a case by case basis. One obvious exception can be found in the case of *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705; [1992] 1 AC 624, HL, where it was accepted that a claim for private rights could be made by way of an action even if it involved a challenge to a *public law act or decision*. This would be followed by:

(a) the case of *Mercury Communications Ltd v Director General of Telecommunications and another* [1996] 1 All ER 575, HL, at p 581, [1996] 1 WLR 48, HL, at p 57; and

(b) the case of *Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council* [1997] 4 All ER 747 CA, at p 755 [1998] 1 WLR 840, CA, at p 848, a decision of Lord Woolf MR.

[43] In the instant appeal, the exceptions as set out in *O'Reilly* do not apply. Pure and simple, we have the new O 53 of the RHC to follow as our guide.

(c) Post 2000 – cases after the amendment of O 53 of the RHC

[44] Gopal Sri Ram JCA speaking for this court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*, pointed out that the new O 53 of the RHC was introduced to cure the mischief of its precursor which was much narrower and more restrictive. At p 705 of the report, Gopal Sri Ram JCA had this to say:

> I have thus far mentioned cases going the one way. There are several cases going in the opposite direction. I need only mention one of these. It is a decision of critical importance to English practitioners. But it also provides us much needed guidance when construing our own O 53 which is comparatively new. The case I refer to is *Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council* [1997] 4 All ER 747. The principal judgment was delivered by Lord Woolf MR, now Lord Chief Justice, the acknowledged authority on modern civil procedure and administrative law in the Commonwealth. There are two passages in his judgment that merit reproduction. The first appears at p 754 where he said this:
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> > ... What I would suggest is necessary is to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in *O'Reilly v Mackman*. This guidance involves recognising: (a) that remedies for protecting both private and public rights can be given in both private law proceedings and on an application for judicial review; (b) that judicial review provides, in the interest of the public, protection for public bodies which are not available on private law proceedings (namely the requirement of leave and the protection against delay).
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> The second passage appears at p 755. It reads:

> … If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of cases it should not be necessary for purely procedural reasons to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave.

[45] Again, Gopal Sri Ram, JCA speaking for this court in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 CA, and after applying the principle as set out in *Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council*, said that the proper mode to challenge the decision of a public authority would be by way of an application for judicial review.

[46] Heliliah Mohd Yusof JCA writing a separate judgment for this court in *Dato' Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422, CA, agreed with the principle in *O'Reilly* that the proper mode to challenge the decision of a public authority would be by way of an application under the new O 53 of the RHC. At p 436 of the report, this was what Her Ladyship said:

> This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case the Federal Government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under O 53.

[47] In *Subramaniam Vythilingam v The Human Rights Commission of Malaysia (SUHAKAM) & Ors* [2003] MLJU 94; [2003] 6 CLJ 175, sitting on the High Court bench, I had occasion to apply *O'Reilly* and this was what I said at pp 203–204 of the report:

A It was rightly submitted on behalf of the defendants that by choosing to file encl (1), the plaintiff was deliberately attempting to get around the following stringent mandatory requirements and safeguards as enumerated in O 53 of the RHC:

(a) the plaintiff would have to apply for leave of the court under O 53 of the RHC;

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(b) the leave application would have to be filed within 40 days from the date when the grounds of the application first arose; and

(c) the plaintiff would have to serve his leave application on the Attorney-General's Chambers.

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It was vigorously argued that under category (a) the court may have refused to grant the leave and that under category (b), encl (1) would have been filed well out of time and that the court may have refused to grant the plaintiff an extension of time. Under category (c), it was pointed out that the Attorney-General's Chambers would have had the opportunity of addressing the court and opposing the leave and the substantive applications. For all these reasons, it was rightfully submitted that encl (1) constituted an abuse of the process of the court and that it ought to be struck out forthwith. I draw solace from the speech of Lord Diplock in the House of Lords in the case of *O'Reilly And Others v Mackman And Others* [1983] 2 AC 237 ...

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[48] At the High Court level, Clement Skinner J, in *Shaharuddin Ali & Anor v Superintendent of Lands and Surveys Kuching Division & Anor* [2005] 2 MLJ 555 rightly said that (see pp 787–788 of the report):

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… the plaintiffs' remedy to enforce or protect rights created or acquired or recognised in accordance with the provisions of the Land Code must be sought under public law and not private law. That being the case, the plaintiffs here should have proceeded to seek judicial review of the Minister's Direction and first defendant's decision under O 53 of the RHC, unless of course they can bring themselves within the exceptions to the general rule stated in *O'Reilly v Mackman* which is the next question I will address.

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[49] And finally at p 792 of the report, Clement Skinner J, concluded his judgment by saying:

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In the result, for all the reasons given above, I hold that it was an abuse of process for the plaintiffs to resort to an action for declaration and thereby evade the clear requirements of O 53 of the RHC. I allow the appeal with costs and strike out the plaintiffs' suit.

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[50] In *TR Lampoh ak Dana & Ors v Government of Sarawak* [2005] 6 MLJ 371, Abdul Aziz Abdul Rahim JC (now judge), at the High Court level, held that where the plaintiff challenged the act or a decision of a public action by

way of a writ action instead of by way of an application for a judicial review under the new O 53 of the RHC, that constituted an abuse of the process of the court.

[51] In *Soonly Limes Factory Sdn Bhd v Pengarah Jabatan Pengangkutan Negeri Perak* [2006] 2 CLJ 676, Mohd Azman Husin J, at the High Court level, also held that the plaintiff's cause of action against the defendant's refusal to renew the road tax of the plaintiff's vehicle was grounded on public law and that being the case the plaintiff's remedy was by way of a judicial review under the new O 53 of the RHC and not by way of an originating summons.

[52] Noor Azian Shaari JC (now judge) in *Ghozi Abu Bakar v Majlis Angkatan Tentera & Anor* [2006] 4 CLJ 291, at the High Court level, rightly applied the law when she said at pp 297–298 of the report:

> Basically his grievance is that he was denied natural justice and a right to be heard and hence the cancellation of his commission and retirement was ultra vires or excess of jurisdiction. Hence, it is clear that the plaintiff is seeking to set aside a decision of a public authority that he alleges is ultra vires contrary to the principle of natural justice and the right to be heard.
>
> Since the plaintiff is seeking a remedy on an allegation that a public authority that is entitled to protection under the law has exceeded or infringed the law, the plaintiff must proceed by way of a judicial review and not by way of an ordinary action ie, in the case the plaintiff has chosen by way of writ and statement of claim for an injunction or otherwise.
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> By filing the writ and statement of claim and not by way of O 53 of the RHC it appears that the plaintiff is trying to circumvent the leave requirement of O 53 of the RHC.

[53] All these cases show a common denominator and that would be this. That the Malaysian courts have dutifully applied the principle as enunciated by Lord Diplock in *O'Reilly* to the effect that where an issue depended exclusively on the existence of a purely public law right, then the matter must be determined in judicial review proceedings and not otherwise.

A **[54]** For the reasons adumbrated above, we unanimously dismissed the appeal with costs. The learned judicial commissioner had applied the correct principles and we accordingly affirmed his decision. The deposit should rightly go to the defendants/respondents on account of taxed costs.

B **[55]** My learned brothers, Low Hop Bing JCA and Sulaiman bin Daud JCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.

Appeal dismissed with costs.

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Reported by K Nesan

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